United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

644

IN THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 22,952

UNITED STATES OF AMERICA,
APPELLEE

v.

JAMES M. DYKES,
APPELLANT

APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

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No. 22,962

Question Presented

Appellant was repeatedly named and accused in the confessions of his co-defendants, which were put before the jury in their joint trial. His conviction was affirmed by this Court in 1962. The question presented by this appeal is whether, in view of the 1968 decisions of the Supreme Court in Bruton v. United States, 391 U. S. 123, and Roberts v. Russell, 392 U. S. 293, which clearly reach the circumstances of appellant's case, the District Court erred in refusing to grant appellant's motion for vacation of sentence pursuant to 28 U.S.C. §2255, which was grounded on those cases.

Prior cases:

Appellant's conviction has been challenged in this Court in the following prior cases (See p. 1-3, infra):

1. Dykes v. United States, (No. 16,882) 114 U.S. App. D.C. 189, 313 F.2d 580 (December 20, 1962), (direct appeal).

2. Dykes v. United States, (No. 18,861) 120 U.S. App. D.C. 55, 343 F.2d 337 (February 19, 1965), (collateral attack).

3. Dykes v. United States, No. 20, 242, judgment rendered January 4, 1967, (collateral attack).

4. No. 18,449 (pro se)

Index

Table of Cases

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,262

UNITED STATES OF AMERICA,
APPELLEE

v.

JAMES M. DYKES,
APPELLANT

APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

References to Rulings

In 1961 appellant Dykes was convicted of second degree murder, robbery, and unauthorized use of a motor vehicle, after a joint jury trial with four co-defendants. Alleged confessions of three of the four co-defendants, which repeatedly named and accused Dykes, were introduced as evidence before the jury at the trial. The instant proceeding is an appeal from a denial by the District Court of a motion for vacation of appellant's sentence filed pursuant to

28 U.S.C. §2255. The basis for this collateral attack on appellant's conviction is Bruton v. United States, 391 U.S. 123, decided May 20, 1968, made applicable on habeas corpus (retroactive) by Roberts v. Russell, 392 U.S. 293, decided June 10, 1968. There have been three prior rulings by this Court in appellant's case, all centering on the issue which was later to be presented to the Supreme Court in Bruton and all deciding the issue unfavorably to appellant. However, all these cases were decided before the Bruton case was decided by the Supreme Court so that, we respectfully submit, this is a wholly fresh case uncontrolled by the prior rulings and controlled by Bruton The first of these prior rulings was Dykes v. United States, (No. 16,882) 114 U.S. App. D. C. 189, 313 F.2d 580 (December 20, 1962), cert. denied, 374 U.S. 837 (June 17, 1963), which affirmed appellant's conviction on direct appeal. The second was Dykes v. United States, (No. 18,861) 120 U.S. App. D. C. 55, 343 F.2d 337 (February 19, 1965), which refused collateral relief. The third was Dykes v. United States, No. 20,242, judgment rendered January 4, 1967, which also refused collateral relief. */ More detailed discussion of these rulings,

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*/ Appointed counsel represented Dykes in the District Court and this Court in all three of these proceedings. In addition to these proceedings, this Court on March 12, 1964, denied Dykes' pro se motion for appointment of counsel and dismissed as frivolous Dykes' appeal (granted by the District Court) from the District Court's denial of a pro se §2255 motion. No. 18,449.

and of the whole prior history of this extraordinary litigation, will be found further on in the brief.

Statement of the Case

As stated, this is an appeal from the denial by the District Court of a §2255 motion. This Court has jurisdiction under 28 U.S.C. §§1291 and 2255.

The mere statement of the facts of appellant's trial demonstrates conclusively that his case is embraced by Bruton v. United States, supra. Part I of this section of the brief sets forth the facts of the trial. Part II recites the history of the case which followed the trial up to the present time.

I

On February 21, 1961, appellant Dykes was indicted with four co-defendants, Jackson, Coleman, Tatum and Washington, for felony-murder, robbery and unauthorized use of a vehicle. 22 D.C. Code §§2401, 2901 and 2204. The five defendants were charged with stealing a car on the evening of December 23, 1960, and thereafter on the same evening robbing Fannie and Victor Schery on Sheriff Road, N. W., in the course of which robbery Victor Schery was shot and killed. Prior to trial, Dykes and Washington sought severance which

was denied. Joint trial of all five defendants before a jury occurred in the fall of 1961.

Oral and written post-arrest confessions alleged to have been taken by the police from Jackson, Coleman and Tatum, but not from Dykes or Washington, were introduced into evidence at the trial. Tr. 1397-1399, 1404-1406, 1455-1457, 1482-1484, 1528-1531, 1539-1541, 1545-1548 (oral), Tr. 1583-1609 (written). The defendants objected to the introduction of these confessions on many grounds, including coercion, Mallory, inadequate warning as to constitutional and statutory rights, and prejudice to co-defendants named in the statements. Tr. 1279-1376. On Appeal the Court of Appeals ruled that Coleman's and Tatum's confessions were erroneously admitted. Coleman v. United States, 114 U.S. App. D. C. 185, 313 F.2d 576 (1962); Tatum v. United States, 114 U.S. App. D. C. 183, 313 F.2d 479 (1962). */

*/ On May 1, 1963, Coleman and Tatum, whose cases had been remanded to the District Court for a new trial, pleaded guilty to unauthorized use of a vehicle. On May 31, 1963, each was sentenced to 8 months to 2 years imprisonment. The murder and robbery counts outstanding against them were dismissed. Tatum and Coleman were released from prison on November 20, 1964 and December 11, 1964, respectively.

The alleged confessions described the theft of the automobile, the robbery and the shooting at great length and in detail. The references to other defendants contained in the confessions were not deleted when the confessions were put in evidence. The actual names of each of the defendants named in the confessions were given to the jury. */ All the confessions named Dykes as a participant in the theft of the automobile and the robbery-shooting. Dykes was named, and his name was read to the jury, 25 times in Coleman's written confession (Tr. 1583-1591), 29 times in Tatum's written confession (Tr. 1591-1600), and 28 times in Jackson's written confession (Tr. 1600-1609). The pronouns "he, his, him" (referring to Dykes), and "we, us, they" (referring to Dykes and other defendants) were used, and read to the jury, 44 times in Coleman's written confession, 35 times in Tatum's written confession, and 46 times in Jackson's written confession. In testimony to the jury as to the alleged oral

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*/ One of the police officers who testified to the alleged oral confessions avoided stating the names of codefendants (Tr. 1397-1399, 1404-1406), but the other three police officers who testified to oral confessions stated the names of the codefendants, including Dykes, allegedly named in the confessions. (Tr. 1455-1457, 1482-1484, 1528-1531, 1539-1541, 1545-1548). The names of the codefendants, including Dykes, were not deleted from any of the three alleged written confessions when they were put before the jury. (Tr. 1583-1609).

statements of Coleman (Tr. 1455-1457, 1528-1531), Tatum (Tr. 1539-1541), and Jackson (Tr. 1482-1484, 1545-1548), Dykes was named 21 times, 9 times and 18 times, respectively, and he was referred to by pronouns 41 times, 21 times and 48 times, respectively.

Unlike Dykes, the defendant Washington was named as a participant in the crimes only in Jackson's confessions, which accused Washington, together with Dykes, Coleman, Tatum and Jackson, of total involvement in the crimes. Tr. 1482-1484, 1545-1548, 1600-1609. Coleman's and Tatum's confessions, on the other hand, did not name Washington at all, or refer to any person other than Dykes, Coleman, Tatum and Jackson as participants in the crime. */

Coleman, Tatum and Jackson each testified, in and out of the presence of the jury, that his interrogation by the police was accompanied by beatings and threats. Each denied that he made the

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*/ Washington's counsel objected "strenuously" (Tr. 1433) and successfully to Dykes' counsel's request that the names of codefendants be masked or deleted when the confessions were introduced. He said:

> "[Washington is named] in one statement, [Jackson's], but I want it before the jury that he isn't named in the other two [Coleman's and Tatum's]." Tr. 1433, 1439. (Emphasis added).

At Tr. 1473 Police Officer Wilson testified: "Coleman admitted his part and implicated others." Counsel for Washington (Tr. 1478-A): "[H]e did not implicate James Washington, did he?" Wilson (Tr. 1479): "Not in my presence, sir." Washington's counsel did not join the objection which counsel for the other four defendants made to the names of codefendants mentioned in the confessions being read to the jury. Tr. 1441. He even mentioned to the jury in his closing argument the omission of Washington's name from Coleman's and Tatum's confessions. Tr. 1923.

statements introduced against him. Tr. 1658-1661, 1678-1686; Tr. 1730-1739, 1748-1761; Tr. 1787-1791, 1797-1821 (jury present); Tr. 1162-1167, 1179-1183, 1207-1212, 1216-1222, 1240-1252 (jury not present). Three witnesses corroborated Tatum's testimony that he was beaten. Tr. 1775-1783, 1225-1235. The police denied coercion. They testified to having given Coleman, Tatum and Jackson truncated statements of advice as to their rights. There was no testimony that the police advised any of the three of their rights respecting counsel. None of the three had either counsel or judicial advice before he gave his alleged confessions. Tr. 842, 847-848, 866, 870, 888, 980, 1033-1035, 1076-1077, 1097, 1131, 1583-1584, 1592-1593, 1601.

The jury convicted Dykes, Jackson, Coleman and Tatum of second degree murder, robbery, and unauthorized use of a vehicle. It acquitted Washington, who had not been named in Coleman's and Tatum's confessions, of murder and robbery and convicted him of unauthorized use of a vehicle. Tr. 2039-2040. The trial judge granted Washington's motion for judgment n.o.v. and acquitted him of the car theft. He sentenced Dykes, Coleman and Tatum to terms of 8 to 24 years on count one of the indictment (murder), 4 to 12 years on count 2 (robbery), and 1 to 3 years on count 3 (unauthorized use), the sentences to run consecutively. (The sentences totaled 13 to 39 years). Jackson received consecutive sentences of 10 to 30 years,

4 to 12 years, and 1 to 3 years. (15 to 45 years.)

II

All four convicted defendants appealed their convictions. On December 20, 1962, this Court issued its decisions in all four appeals. Jackson, Coleman, Tatum, Dykes v. United States, 114 U.S. App. D. C. 181, 185, 188, 189, 313 F.2d 572, 576, 579, 580. Coleman's and Tatum's convictions were reversed on Mallory grounds. Jackson's and Dykes' convictions were affirmed. As to Dykes, the Court said:

> "His contention that the District Court erred to his prejudice in denying a severance raises a substantial question....That the admissions of other defendants implicated appellant Dykes as well does not compel severance....The Court duly charged the jury not to consider any defendant's statements made in the absence of other defendants as evidence against the others."

The Court also rejected Dykes' argument that the evidence against him was insufficient. Dykes' pro se petition for rehearing en banc was denied. Certiorari, sought by appointed counsel, was also denied. 374 U.S. 837 (June 17, 1963). */

*/ On July 22, 1963, the trial judge denied Dykes' pro se motion for a reduction of sentence dated July 17, 1963. On September 30, 1963, Dykes moved the trial court pro se for vacation of his sentence pursuant to 28 U.S.C. §2255. The Court denied the motion on January 2, 1964, and granted an appeal on January 17, 1964. Dykes then moved this Court for appointment of counsel. On March 12, 1964, the Court denied the motion for appointment of counsel and dismissed the appeal "as frivolous." No. 18,449.

Subsequent to this, in 1964 and 1965 (long before Bruton), Dykes, by appointed counsel, mounted two collateral attacks in the District Court, both of which failed there. He carried both to this Court, also by appointed counsel, and they failed there also. This Court's order of affirmance in the first case (No. 18,861) (Judge Fahy dissenting) is Dykes v. United States, 120 U.S. App. D. C. 55, 343 F.2d 337 (February 15, 1965). The Court denied rehearing en banc of the case. Three judges would have granted rehearing. The Court's order of affirmance in the second case (No. 20,242) (Judge Fahy again dissenting) was not published in West. It is reproduced as an appendix to this brief.

The nature and history of these two prior collateral attacks is explicated in Judge Fahy's dissenting opinions in both cases. In both cases, and especially in the second, Dykes sought relief under 28 U.S.C. §2255 on the basis of Jones, Short and Jones v. United States, 119 U.S. App. D.C. 284, 342 F.2d 863 (1964) and Jackson v. Denno, 378 U.S. 368 (1964), both of which were decided after Dykes's conviction was affirmed on appeal. In substance, the contentions raised in the two collateral attacks, including the argument for retroactivity, were precisely the arguments which

the Supreme Court later accepted in Bruton v. United States, supra, and Roberts v. Russell, supra.

This Court rendered its judgment in the second collateral attack (Appendix) on January 4, 1967. On January 15, 1967, Dykes escaped from prison. On January 31, 1967, appointed counsel for Dykes (present counsel) filed a "motion for order granting permission to appointed counsel to withdraw, or in the alternative for a postponement of indefinite duration of the time for filing a petition for rehearing en banc, pending the return of appellant to custody." On February 17, 1967, the Court issued an order permitting counsel's withdrawal. On May 20, 1968, the Supreme Court decided Bruton. On June 10, 1968, it decided Roberts v. Russell, making Bruton retroactive. On January 29, 1969, Dykes was returned to the District of Columbia jail and on January 31, 1969, he was returned to Lorton. Sometime in March 1969 Dykes mailed a hand-written §2255 motion to the District Court in which, drawing on past briefs of appointed counsel in his cases, he outlined the facts of his case. He cited Bruton and Roberts v. Russell in the motion, and sought appointment of counsel. The motion stated that mail service was made on "the United States Attorney's Office." The motion was officially filed on March 25 and was denied by the District Court on that day in a brief Order that is in the record.

The Order granted leave to proceed in forma pauperis and referred the request for appointment of counsel to this Court, thereby, it appears, impliedly granting this appeal. Also, the Clerk filed a formal notice of appeal for Dykes.

ARGUMENT

Bruton v. United States and Roberts v. Russell Plainly and Unequivocally Entitle Dykes to Vacation of His Sentence Pursuant to 23 U.S.C. §2255

Nothing could be clearer than that Bruton v. United States, 391 U.S. 123 (1963), made retroactive by Roberts v. Russell, 392 U.S. 293 (1968), reaches Dykes' case and entitles him to vacation of his sentence pursuant to 28 U.S.C. §2255. In Bruton the Supreme Court overruled Delli Paoli v. United States, 352 U.S. 232 (1957), and held that it is a violation of a defendant's constitutional right of confrontation of the witnesses against him for a co-defendant's confession that accuses him to be admitted at the defendant's and co-defendant's joint trial, and that limiting instructions are ineffective and cannot and do not cure the error. */

*/ The Supreme Court held that these principles applied even if the co-defendant's confession was properly admitted against the co-defendant, as it was in Delli Paoli, a ruling that goes beyond the needs of Dykes, since two of the three alleged confessions which accused him were held on appeal to have been wrongfully admitted against their makers. Coleman v. United States, 114 U.S. App. D.C. 185, 313 F.2d 576 (1962); Tatum v. United States, 114 U.S. App. D.C. 188, 313 F.2d 579 (1962). The ruling went beyond the needs of the petitioner Bruton as well, for the confession of Bruton's co-defendant, Evans, which accused Bruton, was inadmissible against Evans. Moreover, Evans was acquitted on re-trial without the confession, just as the serious charges against Coleman and Tatum were dismissed, after their convictions were reversed on the ground of the inadmissibility of their confessions. It is to be observed that, as

(Continued on page 13)

In Roberts v. Russell, supra, the Supreme Court made Bruton retroactive and available to convicted defendants on habeas corpus. */ Since Roberts v. Russell, old convictions affected by the error condemned in Bruton have been overturned on habeas corpus in the federal courts in at least four cases: U.S. ex rel Johnson v. Yeager, 399 F.2d 508 (3rd Cir. 1968), cert. denied, 89 S. Ct. 620 (1969) (The petitioner Johnson in this case was also the petitioner in Johnson v. New Jersey, 384 U.S. 719 (1966), in which

(Footnote continued from page 12)
recited in Bruton, the Solicitor General confessed error and advocated the reversal of Bruton's conviction because of what happened to Evans.

> The Solicitor General states that this disposition is urged in part because "[h]ere it has been determined that the confession was wrongly admitted against [Evans] and his conviction has been reversed, leading to a new trial at which he was acquitted. To argue, in this situation, that [petitioner's] conviction should nevertheless stand may be to place too great a strain upon the [Delli Paoli] rule--at least, where, as here, the other evidence against [petitioner] is not strong."

We remark the contrast between the Solicitor General's position in Bruton and the Government's stout defense of Dykes' conviction in Nos. 18,861 and 20,242 after Coleman and Tatum's confessions were ruled inadmissible against them and the serious charges against them were thereupon and therefore dismissed.

*/ Other habeas corpus cases which the Supreme Court has remanded to a Court of Appeals for consideration in light of Bruton and Roberts v. Russell are Wade v. Yeager, 392 U.S. 661 (1968), and Bates v. Nelson, 393 U.S. 16 (1968).

the Supreme Court held that Miranda v. Arizona, 384 U.S. 436 (1966) is not retroactive); U.S. ex rel LaBelle v. Mancusi, 404 F.2d 690 (2d Cir. 1968); Towsend v. Henderson, 405 F.2d 324 (6th Cir. 1968); U.S. ex rel Joseph v. LaVallee, 290 F. Supp. 90 (D.C. N.D. N.Y. 1968). Compare U.S. ex rel Cantanzaro v. Mancusi, 404 F.2d 296 (2d Cir. 1968). Among the important cases in which Bruton has been applied to overturn convictions on direct appeal are Serio v. United States, ___ U.S. App. D.C. ____, 401 F. 2d 989 (1968); Jones v. United States, 402 F.2d 851 (2d Cir. 1968); United States v. Bujese, 405 F.2d 888 (2d Cir. 1969). Compare Harrington v. California, 37 Law Week 4472 (U.S. S.C. June 2, 1969), Santoro v. United States, 402 F.2d 920 (9th Cir. 1968).

Dykes' case is plainly embraced by Bruton, and is, indeed, a classic illustration of the abuses which Bruton has at last brought to an end. The alleged confessions of Dykes' three co-defendants, which were admitted into evidence at Dykes' trial, accused him over and over again of participation in the crimes with which he was charged. Dykes' name appeared 84 times in the confessions of Coleman and Tatum. He was referred to by pronouns in these confessions 141 times. These confessions have been expressly held to be inadmissible even against their alleged makers, and as a result the serious charges against Coleman and Tatum were

dismissed. Dykes' name appeared in Jackson's confessions 46 times and he was referred to by pronoun in Jackson's confessions 94 times. The references to Dykes were not deleted or even obscured when the confessions of Coleman, Tatum and Jackson were given to the jury. Bruton establishes beyond dispute that the confessions of Dykes' codefendants, which named him by name and by pronoun a total of 365 times, profoundly and overwhelmingly prejudiced him. It lays finally to rest the fiction that the jury could or did fail to apply the confessions to Dykes just as if they had constituted legitimate evidence against him. As a practical and legal matter, therefore, no one can now dispute that the admission of the confessions into evidence at Dykes' trial denied him a fair trial. It is important to note, in this connection, that the confessions were not mere surplusage in the case against Dykes. Compare Harrington v. California, supra. On the contrary, it is accurate to say that Dykes probably would not have been convicted except for the confessions. Apart from the confessions, the evidence against Dykes was scanty and incoherent. Taken by itself it very likely would have failed to persuade the jury to convict Dykes. */

*/ The evidence against Dykes, apart from his codefendants' confessions, was described by this Court as follows:

> "There was evidence from which the jury might have found that Dykes was with the other appellants immediately before and after the robbery-killing, that he fled to New York under an alias with articles stolen from the get-away car...." 114 U.S.

(Continued on page 16)

Furthermore, the acquittal by the jury of the codefendant Washington graphically demonstrates that it was the admission into

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*/ (Continued from page 15)
App. D.C. at 190, 313 F.2d at 581.
In light of the subsequent dismissal of the murder and robbery charges against Coleman and Tatum and their conviction only of unauthorized use of a vehicle, the worth and/or the admissibility against Dykes of almost all of this evidence is destroyed. It is meaningless that he was with the other appellants immediately before and after the robbery-killing if two of those three have been acquitted by process of law of involvement in the robbery-killing. Again, though there was evidence linking Dykes to the stolen car, the only evidence that it was the get-away car for the robbery-killing was in the three confessions, which not only are inadmissible against Dykes, but also in two out of three instances are inadmissible against the confessor. Thus, the fact that Dykes was found in possession of articles taken from the car which was stolen the night of the murder is evidence not that the car was the get-away car but only that Dykes could have been involved in the minor offense of theft of the car. Coleman and Tatum have been convicted of that crime, but only of that crime. Evidence which the government has not been able to use to convict Coleman and Tatum of the greater crime cannot be cited by the government to uphold Dykes' conviction of the greater crime.

This Court said further:

> "There was evidence from which the jury might have found that Dykes...admitted to an acquaintance that he was an active participant in the robbery."

This refers to the testimony of Paul Gordon. But Gordon's testimony was vague, disjointed, and contradictory. In this connection, the Court is requested to read Trial Tr. 568-618, 641-648, 1264-1271, 1621-1626, which constitutes all of the testimony of Gordon given in and out of the presence of the jury. Like the rest of the scanty evidence against Dykes, Gordon's testimony was unintelligible outside the context of the confessions of Dykes' codefendants. Clearly Dykes' conviction was not and could not have been based on Gordon's testimony alone, or on Gordon's testimony taken with the other scanty evidence against Dykes. The confessions of his codefendants were crucial to Dykes' conviction and Bruton makes it impossible to suppose any longer that they were not.

evidence of the confessions, and particularly Coleman's and Tatum's confessions, and not any competent evidence against Dykes, that caused the jury to convict Dykes. Dykes was named as a participant not only in Jackson's confession, but in Coleman's and Tatum's confessions as well. Washington, on the other hand, was named as a participant only in Jackson's confession. As noted, p. 6, infra, Washington's counsel successfully strove and fought to bring this fact home to the jury */ and Washington was acquitted, while Dykes, named in all three confessions, was convicted.

In sum, the multitudinous accusatory references to Dykes in the three confessions, the scanty legitimate evidence against Dykes, Washington's acquittal and his counsel's strategy in bringing it about, and the subsequent history of Coleman and Tatum after they were convicted with Dykes, taken together and alone, all make Bruton's application to Dykes' case indisputable.

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*/ thereby making, we say with respect, rather a charade of the trial court's limiting instructions, which in any event have been shown by Bruton and Roberts v. Russell to have been wholly ineffective.

Nothing stands in the way of vacation of Dykes' sentence pursuant to §2255. The prior unsuccessful collateral attacks do not stand in the way because they were decided before Bruton was decided. Sanders v. United States, 373 U.S. 1 (1963). The Harrington v. California exception to Bruton does not apply because the legitimate evidence against Dykes was, to say the least, not "overwhelming." Moreover, in contrast to the defendant in Harrington and in Santoro v. United States, supra, Dykes was not in fact able to confront and cross-examine his accusers. As in Townsend v. Henderson, supra, in which a Bruton conviction was vacated on habeas corpus, Dykes' accusers took the stand but only to deny that they made the alleged confessions. Finally, nothing in the circumstances or the law surrounding Dykes' escape from custody deprives him of his rights under Bruton and Roberts v. Russell. His application for relief under those cases was made about nine months after they were decided. That short interval between the accrual of the right and the claim under it, (however much longer it was than it otherwise might have been had Dykes been in custody when the cases were decided) obviously has no significance as either a practical or a constitutional matter. */

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*/ The escape itself is, of course, presumably reachable under 18 U.S.C. §751(a), which makes escape a felony.

CONCLUSION

WHEREFORE, it is respectfully requested that the judgment of the District Court be reversed and that appellant's conviction and sentence be vacated pursuant to 28 U.S.C. §2255.

Respectfully submitted,

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June 9, 1969

Certificate of Service

I certify that a copy of the foregoing brief has been hand delivered to the Office of the United States Attorney in the United States Court House this _____ day of June, 1969.

William H. Willcox

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,242 — September Term, 1966

James M. Dykes,

Appellant

v.

United States of America,

Appellee

Civil 2914-65

United States Court of Appeals for the District of Columbia Circuit

Filed January 4, 1967

Appeal from the United States District Court for the District of Columbia.

Before: Prettyman, Senior Circuit Judge, and Fahy and McGowen, Circuit Judges.

JUDGMENT

This case came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION THEREOF, it is ordered and adjudged by this court that the order of the District Court appealed from in this case is hereby affirmed.

Per Curiam

Dated: January 4, 1967

Dissenting opinions by Circuit Judge Fahy.

FAHY, Circuit Judge, dissenting: I respectfully dissent. Laying aside the question whether appellant is entitled to relief under 28 U.S.C. §2255, as to which see People v. Pranda, 47 Cal. Reptr. 353, 407 P.2d 265, I would grant the relief I was ready to grant when the general problem presented by this appellant was considered by me in my dissent from the judgment entered in Dykes v. United States, 120 U.S. App. D.C. 55, 343 F.2d 337. I now dissent for the same reasons there expressed. I feel free to do this notwithstanding the judgment of the court there reported because it is uncertain that the court in then affirming the judgment of the District Court, without stating the grounds for doing so, decided the question before us now, that is, the effect of the intervening decision of this court in Jones, Short and Jones v. United States, 119 U.S. App. D.C. 284, 342 F.2d 863.[1/] The denial by the court en banc of reconsideration of the judgment of the division was not a decision on the merits of any question.

1/ The District Court proceedings from which Dykes there appealed were begun by motion for writ of error coram nobis seeking the reduction of his sentence in light of the recently shortened sentences imposed on other co-defendants. Shortly before argument of this matter in the District Court Jones, Short and Jones was decided by this court. Dykes then urged in his argument in the District Court that our decision be considered on the matter of his sentence. He also requested that his motion for the writ be treated as a motion, pursuant to 28 U.S.C. §2255, to reverse his conviction on the basis of intervening law. The District Court held that coram nobis did not lie and declined to treat the motion as one brought under Section 2255. This court affirmed without opinion.

REPLY BRIEF FOR APPELLANT

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UNITED STATES COURT OF APPEALS
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REPLY BRIEF FOR APPELLANT

The government asserts that Dykes' conviction survives Bruton and Roberts v. Russell. The sole argument made to support the assertion is that unlike the defendant in Bruton, Dykes was not denied his Sixth Amendment right to confront and cross-examine his accusers, since they took the stand at trial. The argument is singularly unmeritorious, not to say disingenuous.

As the government says (Br. 3), the three co-defendants whose confessions accusing Dykes were read to the jury took the stand at trial and there denied involvement in the crime and repudiated

their confessions as coerced and untrue. They made no accusations against Dykes. Yet the government says that since the co-defendants took the stand and could have been confronted and cross-examined there by Dykes Bruton does not apply. It says that Dykes' failure to cross-examine was a tactical choice made in the hope that the jury would believe the repudiations.

The government's argument bespeaks a total misconstruction of Bruton and the right of confrontation. Where accusations are not made on the witness stand, what is there to cross-examine about? Why should the defendant be charged with failure to cross-examine in such circumstances? The answer given to these questions by the government is frivolous, and indeed positively shocking in its implications. The government says (Br. 6) "The confessing co-defendant could still be questioned about the facts and circumstances contained in the repudiated confession as they related to the non-confessing co-defendant." (Emphasis added). But how can, and why should, the non-confessing co-defendant cross-examine about the accusations ("the facts and circumstances") in the repudiated confession when the accusations in the confessions are not evidence and have not

been made, and indeed have been repudiated, on the stand? Obviously he cannot and should not. */ The truly incredible essence of the quoted statement of the government is that it makes the accusations against the defendant in the repudiated confession of the co-defendant into evidence against the defendant, when in fact the accusations are plainly not evidence. The government's words that "the confessing codefendant could still be questioned about the facts and circumstances contained in the repudiated confession" shows clearly that the government seeks to have treated as evidence matter which even before Bruton was clearly understood not to be evidence. Bruton simply held that such matter hopelessly poisons the fairness of

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*/ The government says (Br. 3, 5) that Dykes cross-examined one of the co-defendants, Jackson, at Tr. 1687-88 and 1693. The "cross-examination" at Tr. 1687-88 was (1) introduction by Dykes' counsel of a post-arrest affidavit made by Jackson which, like his testimony on the stand, repudiated the confession and specifically repudiated the accusation against Dykes (see Tr. 1688-1692) and (2) the following colloquy between Dykes' counsel and Jackson: "Q. Mr. Jackson, prior to the beginning of this trial had you even seen me before? A. No, sir." The "cross-examination" at Tr. 1693 also was by way of emphasizing the repudiation of the accusing confession. "Q. You testified earlier, Mr. Jackson, that some time during the day Dykes departed from your company, is that correct? A. Yes, sir. Q. You were not very drunk at that time, were you, sir? A. No, sir." Respectfully we submit that the government's characterization of these colloquies as "cross-examination" and its attempt, without describing or discussing the colloquies, to make something of them (Br. 3,5), simply illustrates and confirms the poverty of the government's argument.

joint trials and that limiting instructions are no antidote. Thus the government's argument has the perverse effect of transforming Bruton from a shield to protect defendants against introduction into their trials of accusatory extra-judicial statements of their co-defendants into a club which turns such statements into admissible evidence if the co-defendant takes the stand to repudiate his extra-judicial statement. The government's view leaves defendants even worse off then they were before Bruton. The right to confront one's accusers in open court is the right to confront one's accusers who make their accusations in open court. The confrontation envisioned by the government is a will of the wisp, for one cannot confront an accuser who does not accuse. The government's concept of the right of confrontation is actually the reverse of the true right of confrontation. It is the very essence of the unconstitutional abuse that the right of confrontation is meant to protect defendants against.

Townsend v. Henderson, 405 F.2d 324 (6th Cir. 1968) is precisely in point, as we stated (appellant's brief, p. 18) and as

the government recognizes (appellee's brief, p. 6). In that case it was stated (405 F.2d at 329): "The only possible distinction between the present case and Bruton is that in Bruton the co-defendant did not take the witness stand, whereas here Terry did testify in his own behalf. But, this distinction is unimportant since, although Terry was called as a witness, he denied making the confession. Townsend therefore had no effective right of cross-examination in regard to the confession. A similar question was presented in Douglas v. Alabama, 380 U.S. 415, 420 (1965), and it was there held "effective confrontation of Loyd was possible only if Loyd affirmed the statement as his."

The sentence from Douglas v. Alabama quoted in Townsend v. Henderson and set out above, which states that "effective confrontation of Loyd [co-defendant] was possible only if Loyd affirmed the statement [an out of court accusatory statement] as his,"*/ is very important, for it is a Supreme Court pronouncement that states with absolute authority and perfect clarity the obvious fact which shows Dykes' so-called opportunity to confront and cross-examine to be no such opportunity at all. The essence of the matter and the law is that extra-judicial accusations of a defendant by his

*/ See also 380 U.S. at 419: "Loyd could not be cross-examined on a statement imputed to but not admitted by him."

co-defendant do not infect the defendant's trial when admitted therein only if the co-defendant makes the same or substantially the same accusations on the witness stand, where he can be effectively cross-examined on them.

To the same effect as the critical sentence in Douglas v. Alabama is the following critical sentence in Turner v. Lousiana, 379 U.S. 466, 472-473 (1965), quoted in the landmark case of Pointer v. Texas, 380 U.S. 400, 405 (1965), whose strong and eloquent assertion of the value and fundamental importance of the right of confrontation and cross-examination lies at the center of the Bruton decision: "In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." (Emphasis added).

It is interesting and significant to note how, in a footnote (N.7), the government restructures the critical sentence in Douglas v. Alabama. The Supreme Court said that Loyd, who took the stand but also took the Fifth Amendment, could not be effectively confronted because he did not affirm the statement as his. The

government says that Loyd could not be effectively cross examined because he refused to answer all questions concerning the alleged crime. Thus at the key point in the analysis the government drops to a footnote and attempts to blunt the impact of what the Supreme Court said by revamping the Supreme Court's words. The effort is transparent and ineffective. The Supreme Court said that Loyd could not be effectively cross-examined because he did not affirm the statement as his. The government does not tell this Court, because it cannot, how Jackson, Coleman and Tatum could be effectively cross-examined when they, like Loyd, did not affirm their statements as theirs. */

The government cites the following cases to support affirmance: Harrington v. California, 89 S. Ct. 1726 (1969); Santoro v. United States, 402 F.2d 920 (9th Cir. 1968); Rios-Ramirez v. United States,

*/ It should be noted that the government's version of what the Supreme Court said--that there could be no effective cross-examination because Loyd refused to answer all questions concerning the alleged crime--is not itself an inaccurate statement, although it is not what the Supreme Court said. And like the Supreme Court statement, it applies fully to exonerate Dykes, for Dykes' co-defendants also refused to answer all questions concerning the crime, since they denied participation in it on the stand and made no accusations against Dykes there.

403 F.2d 1016 (9th Cir. 1968); United States v. Boone, 401 F.2d 659 (3rd Cir. 1968). The first three of these cases support Dykes' position, not the government's. The fourth case is irrelevant to this case. */ In the first three cases the codefendant not only took the stand but actually affirmed the out of court accusations against the defendant, so that he was subject to effective cross-examination. The government completely fails to recognize and discuss this critical difference between Dykes' case and the cases it relies on, although it notes, without admitting its significance, the fact that in Santoro v. United States the co-defendants "testified regarding each of their out of court statements." (Br. 5). In Harrington the fact that the co-defendant Rhone repeated his out of court accusations on the stand is indicated in the majority opinion and confirmed by the discussion of the facts in the dissent. In Santoro the fact that the co-defendants repeated their accusations on the stand is shown by the detailed description of the testimony

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*/ In the fourth case, Boone, the co-defendant's out of court accusations of the defendant reached the jury because the defendant called the co-defendant as his own witness and the government thereupon properly used the co-defendant's out of court statement to impeach the co-defendant.

Guajardo-Melendez v. United States, 401 F.2d 35 (7th Cir. 1968), also referred to by the government, is yet another case which illustrates the principle that there can be no effective confrontation if the co-defendant does not affirm his out of court statements on the stand. See especially n. 5 at 401 F.2d 38.

at 402 F.2d 922. In summing up the description of the co-defendants' testimony the Santoro court said: "Thus, appellant's three co-defendants took the stand and each testified regarding the subject of his or her out of court statements which implicated appellant." In Rios-Ramirez it was stated at 403 F.2d 1016: "As in Santoro, and contrary to the case in Bruton, defendant Manzano in the present case took the stand and testified regarding the subject of her out of court statements. Much of her direct testimony concerned appellant Rios-Ramirez."

CONCLUSION

Skimming over the surface of Bruton and its progeny, the government ignores what those cases say and hold, in an effort to trivialize Bruton and the Sixth Amendment right of confrontation and actually to nullify them as they apply to Dykes. But Bruton and the right of confrontation cannot be treated so lightly. They are solemn constitutional edicts that must be respected in this case. Respectfully we submit that it is clear beyond argument that they entitle Dykes to vacation of his sentence.

Respectfully submitted,

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